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AUG 17 2007

OFFICE OF PETITIONS

In re Application of :
PETER BENNETT DUFF WHYTE :
Application No. 09/702,037 : DECISION ON PETITION
Filed: 10/27/2000 :
Attorney Docket No. U013032-6 :
:

This is a decision on the petition under 37 CFR 1.181, filed April 30, 2007, to withdraw the holding of abandonment.

On August 8, 2006, the Office mailed a final Office action, which set a three-month shortened statutory period to reply. In the apparent absence of a timely and proper reply, the Office mailed a Notice of Abandonment on April 23, 2007.

In the present petition, applicant requested that the Office withdraw the holding of abandonment as stated in the Notice of Abandonment mailed April 23, 2007. Applicant averred that the Office issued the Notice of Abandonment in error because applicant filed a timely and proper reply to the final Office action of August 8, 2006.¹ Applicant asserted that he filed a Notice of Appeal, and a request for an extension of time for response within the third month, accompanied by a certificate of mailing dated February 8, 2007, albeit identifying an incorrect application number. In support of the assertion, applicant provided a copy of the return, date-stamped postcard acknowledging receipt of the Notice of Appeal in the USPTO on February 12, 2007. Copies of these documents accompanied the petition.

After further review, the Office has located the Notice of Appeal located in the file of Application No. 09/702,307. A review of the correspondence indicates that the USPTO received the response on February 12, 2007, but it was not timely matched with the file due to the incorrect application number.

¹ On February 12, 2007 (certificate of mailing dated February 8, 2007), applicant also filed an amendment; however, the examiner determined that it did not place the application in condition for allowance as indicated in the Advisory Action mailed on April 4, 2007.

Under current Office procedure, if a paper having an incorrect application number contains sufficient information to identify the correct application and was timely received at the Office, the holding of abandonment will be withdrawn. In reviewing the papers, it is concluded that there was sufficient information thereon to associate the papers with the present application file.

Accordingly, applicant has established that he submitted a timely reply to the final Office action in the form of a Notice of Appeal and a three-month extension of time on February 12, 2007 (certificate of mailing dated February 8, 2007). **Therefore, the Office reminds applicant that the two-month extendable period to file an appeal brief in compliance with 37 CFR 41.37, accompanied by the fee, began to run from February 12, 2007, the date of filing the notice of appeal.** The Office notes that "37 CFR 41.37(a) does not permit the brief to be filed within the time allowed for reply to the action from which the appeal was taken even if such time is later." *MPEP 1205*. "Once appellant timely files a notice of appeal in compliance with 37 CFR 41.31, the time period for reply set forth in the last Office action is tolled and is no longer relevant for the time period for filing an appeal brief." *Id.* **Therefore, applicant is required to submit an appeal brief on or before September 12, 2007, accompanied by a request for an extension of time for response within the fifth month and fee to avoid abandonment of this application.** In other words, applicant, himself, started the running of the two-month extendable period to file an appeal brief based upon the date applicant originally submitted the Notice of Appeal with the USPTO.

The petition is granted to the extent indicate above. The holding of abandonment is withdrawn and the application is restored to pending status.

This matter is being referred to Technology Center Art Unit 1651 to await the filing of an appeal brief within the period noted above.

Telephone inquiries related to this decision should be directed to the undersigned at (571) 272-3211.

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